Nine Network Australia Response to Review of the RTI Act 2009 and Chapter 3 of the IP Act 20009.

The following comments are my responses on behalf of Nine Network Australia to select issues raised by the Department of Justice and Attorney-General's Discussion Paper on the Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*. While this author has thoughts on some of the other points highlighted in the Review report, the issues dealt with here focus on matters of most concern to Nine News , Brisbane and our role as Queensland's leading source of television news.

1.1 Is the Act's primary object still relevant? If not, why not?
1.2 Is the "push model" appropriate and effective? If not, why not?

The primary object of the RTI Act remains relevant and appropriate. The RTI Act introduced when it commenced in 2009 put Queensland at the forefront of government openness and transparency. Other states, including Victoria and South Australia and the Commonwealth, are yet to replicate the same level of openness, cultural change and effective review processes.

There needs to be constant vigilance to ensure there is no watering down of the primary test of giving access, that is, there is a right of access to information under the government's control, "unless, on balance, it is contrary to the public interest to give the access (or allow the amendment)". This is the corrective object, along with the explicit provision that it is state parliament's intention that the Act "be administered with a pro-disclosure bias".

These strong provisions need to be protected from a de-facto rollback caused by piecemeal legislative amendments. Some of these include Schedule 3, Section 4A that effectively gave Brisbane City Council decision-making committees the same exemption as State Cabinet. The *Right to Information and Integrity (Openness and Transparency) Amendment Bill 2012* also, has appears intended to make accessing documents less attractive, especially to television journalists, by providing scope for documents to be available to media competitors at the same time as the applicant, removing any advantage or even punishing the original applicant who may have paid substantial processing fees. As explained elsewhere, television news has production and logistics requirements that do not permit broadcast of a news story based on complex documents in hours.

Queenslanders are fortunate to have the *Right to Information Act 2009*, which was passed in a bi-partisan fashion by State Parliament after an exhaustive process of consideration of various alternatives by the Independent Review Panel chaired by Dr David Solomon. It would be an unfortunate, retrograde outcome should there be any backing away from this objective.

The "push" model idea has value for the general community and it is notable that there has been in increase in statistical information the public may find of use has been released. However, the push model policy is a little naïve, ignoring the realpolitik that surrounds release of government information. Nine News has found that State Governments and its agencies restrict the "push" of information to only that which is non-controversial or poses no threat or embarrassment to agency objectives or State Government's political fortunes. Invariably, the information Nine News seeks to access is of public interest due to it being controversial or challenges of government policy or decisions, or activity. State Governments of any persuasion and their bureaucrats will continue to act

with self-preservation when it comes to release of information. The push model may sound appealling in theory but the reality means a very selective process of release.

4.4 Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs be changed? If so, in what way?

4.5 Should coprorations established by the Queensland Government under the Corporations Act 2001 be subject to the RTI Act and Chapter 3 of the IP Act?

The general principle should be that where an agency is owned by the State Government it must be covered by the RTI Act.

I have been surprised at some agencies that are owned by the State Government and have significant involvement in the daily lives of ordinary Queenslanders that have somehow had themselves exempted from RTI.

One of interest is Queensland Motorways, operator of a number of Brisbane roads, including the Gateway and Logan Motorways. It is owned by the State's Defined Benefit Fund, making it 100 per cent owned by Queensland taxpayers. As well as operating tollways, it also operates the GoVia electronic tag toll collection system. Hundreds of thousands of Queenslanders use its roads every day and its GoVia tag system has a million accounts, but it is exempt from the RTI Act. Media requests to Queensland Motorways about the operation of its tollways or GoVia are dismissed with arrogance and there is no access through RTI.

6.1 Should the access application form be retained? Should it remain compulsory? If not, should the applicant have to specify their application is being made under legislation?

The application form is a waste of time and print paper and serves only to promote a bureaucrat façade for the RTI process. Within weeks of the legislation taking effect, bureaucrats were sending back my request because the letter did not contain the "approved" application form. Perhaps for a member of the public without experience using the Act the form has value, but for someone in my situation it is an annoyance. It's no surprise that no other state or the Commonwealth have such a mandatory form.

While I always complete the form, I also always submit a letter outlining the terms of my requests in detail. The official form does not contain enough space to properly describe the requested information, offering the impression that only information in a simple form such as documents known by title may be accessed through RTI. Often my applications seek complex information with up to 10 different points to the request. On occasion I wish to have the space to discuss precedents for the release of the information , or to present a variety of options for how the information can be released to minimise harm to the agency. The application form assumes all requests require just a few lines of space to describe the request.

6.9 Is the current system of charges estimate notices beneficial for applicants? Should removing the charges estimate notice system be considered?

My major area of concern with the Charges Estimate Notice system is that it can needlessly add to the processing time for an application. Even after being notified of a CEN, I am warned not to pay as

the CEN may end up being cheaper than the original estimate. I am required to pay the CEN only when I receive the final amount. It can take several weeks of processing to obtain a cheque from my Accounts department, so a week or more may be added to the total amount of time required to access documents .

I would prefer to have the CEN system changed so that I can start organising to pay the amount based on the first estimate. A refund cheque should be payable if the cost ends up being less than the first estimate. This would speed up the process. Alternatively, maybe the original CEN should be the final cost, thus reducing bureaucracy.

6.10 Should applicants be limited to receiving two charges estimate notices? No

6.11 Should applicants be able to challenge the amount of the charge and the way it was calculated? How should applicant's review rights in this area be dealt with? Yes, there should be a right to a fast review by the Queensland Information Commissioner on issues of cost.

6.13 Should the threshold for third party consultations be reconsidered?

Yes. After concern about the appropriateness of the Disclosure Log timeframes, this is Nine Network Australia's biggest concern with the RTI Act.

The present test that that consultation is triggered where disclosure of information "may reasonably be expected to be of concern" to a third party is too low. The previous FOI Act had a higher threshold of "could reasonably be expected to be of *substantial* concern" to a third party. The low nature of the present threshold sits in conflict with the otherwise pro-disclosure nature of the RTI Act. The previous FOI Act threshold should replace the RTI Act threshold test.

The triggering of consultation provisions results in the following frustrating outcomes:

- The length of time required to access documents lengthens significantly.
- The processing costs of accessing information becomes more prohibitive due to the need for the applicant to pay for the time spent by the decision maker on consultation.
- It is usual that any individual notified that they are affected by a RTI request will not want the information released, especially when they are notified a media outlet is the applicant. The receipt of an official government letter canvassing a response is unlikely to be warmly received by anyone. Then decision makers feel obliged to consider this response, regardless of its merits.

6.14 Should the Acts set out the process for determining whether the identity of applicants and third parties should be disclosed? Yes

7.3 Does the public interest balancing test work well. Should the factors in Schedule 4 Parts 3 and 4 be combined into a single list of public interest factors favouring non-disclosure? The present system works effectively.

7.5 Does there need to be additional protection for information in communications between Ministers and Departments?

There is no need for further secrecy on these types of communications. As outlined in the Discussion Paper, the RTI Act already provides an exemption for information briefing incoming Ministers and many documents prepared by departmental staff for consideration by Cabinet, e.g. Cabinet submissions and agendas. These are adequate protections for decision making. There is no need to extend this further to lock out all access to information between agencies and their Ministers or between Departments.

8.1 Should fees and charges for access applications be more closely aligned with fees, for example for access to court documents?

8.2 Should fees and charges be imposed equally on all applicants? Or should some applicants pay higher charges?

As outlined in the Discussion Paper, there are already provisions for non-profit organisations to apply to the Information Commissioner for hardship process to escape processing fees.

Processing costs for accessing information are already prohibitive in some situations, including for an employee like myself has access to the resources of a major media company.. There are often times when I have been forced to change scope or even withdraw an application due to prohibitive Charges Estimate Notices. Adding to the frustration is that substantial costs may be due to the need to undertake undertake unnecessary consultation due to the low threshold for when consultation is required.

Annoyance levels at large processing costs also increase when documents are placed on a Disclosure Log with little time for us to broadcast a resulting news report due to the provisions of the *Right to Information and Integrity (Openness and Transparency) Amendment Bill 2012*. How does it promote access to government information by charging an applicant large processing fees and then provide other media access to the documents, sometimes in hours. How is this fair and promote use of the RTI Act?

Any attempt to increase the cost of access must be considered in the light of the overall object of the Act of giving right of access unless it is contrary to the public interest. An overpriced CEN is just as effective at discouraging access simply saying no, even where the applicant has the resources of a major media network at their disposal.

9.1 Should internal review remain optional? Is the current system working well?

9.2 If not, should mandatory internal review be reinstated, or should other options such as a power for the Information Commissioner to remit matters to agencies for internal review be considered?

Internal review must remain optional. From my experience with internal reviews under the former Queensland FOI Act and open government legislation elsewhere, internal review *almost always* confirm the initial decision. Within agencies there tends to be a groupthink about certain issues restricting release of information. It is possible the same person within an agency who ultimately

oversees the original decision is also involved in the internal review, regardless of the name of the decision-maker on the Notice of Decision. Only where there are an independent external review process is there a likelihood of getting a fair go with appealing an agency's decision.

The net result of reinstating mandatory internal reviews would be a lengthened process with little benefit for the applicant. It would only insert another few weeks into the process of fighting an agency over a decision and create paperwork.

There may be some merit in having the Information Commissioner request an Internal Review, providing there remains scope for further external appeal to the Information Commissioner should the agency refuse to change its orginal decision.

9.5 Should the RTI Act specifically authorise the release of documents by an agency as a result of an informal resolution settlement? If so, how would this be approached? Yes

This would be a welcome initiative. Any measure that will assist in adding flexibility to the system to ensure the object of the Act is met should be embraced.

Nine News has a number of times been frustrated by the lack of flexibility in the way information can be released by agencies, especially their refusal to proceed with so-called "conditional" releases whereby documents are released with conditions. These situations include conditions, for example, video that can be released subject to pixilation of privacy information.

10.4 Should legislative time frames for external review be reconsidered? Is it appropriate to impose timeframes in relation to a quasi-judicial function?

No. The process of seeking review is already a time consuming one plagued by delays. Removing legislative timeframes will remove structure from the process and send a message to all involved in the external review that the matter is not an immediate priority. It will also enable combative agencies and/or RTI officers to cynically adopt delay strategies that intentionally – or not – disadvantage the applicant.

Legislative timeframes give the aggrieved applicant some security that the review wheels are turning. I have genuine reason to fear that decision-making times will blow out from months to possibly years should these timeframes be removed.

12.1 Are there any other relevant issues concerning the operation of the RTI Act or Chapter 3 of the IP Act that need to be changed.

One matter Nine News wishes to have reviewed as a matter of priority concerns the operation of the Disclosure Log and particularly the hardship caused for television news by the *Right to Information and Integrity (Openness and Transparency) Amendment Bill 2012*. It was unclear why the amendment was necessary or the intended public benefit. No other issue regarding the RTI Act is of greater concern to Nine News. It is not included in the Discussion Paper as a point for consideration, but it should be.

This amendment reduced to theoretically nothing the exclusivity timeframe window for exclusive use of RTI documents. The amendment states documents must be placed on the Disclosure Log "as soon as practicable". Previously, Section 68 of the RTI Act gave a

minimum of 24 hours but was in practice interpreted by major agencies such as Queensland Police Service and Transport and Main Roads as allowing five business days of exclusivity – and it worked effectively.

The situation as it now stands following the amendment means simultaneous disclosure of documents to an applicant and on the Disclosure Log is encouraged, even when considerable processing fees have been invested. This creates an especially unfair situation for television news due its time-consuming production and logistical requirements.

Nine News has a commitment to present reports based on RTI documents in a fair and accurate manner, as it is the case with any other news report it broadcasts. Television news needs time for often complex documents to be properly considered, crews and a reporter assigned and on-camera interviews arranged with agency representatives, Ministers or third parties. The simple task of getting a camera to an appointed interview location may take hours on its own. The amendment makes accurate and appropriate news coverage of information released via RTI almost impossible to achieve.

On a number of occasions in 2013, agencies and Minister approached to respond to issues raised by an RTI release have chosen to wait days to officially respond to questions about their own documents, cynically delaying the time required to produce a news story. In one recent case, documents related to Queensland Police Service RTI 9963 concerning mobile speed camera fines that did not progress involved payment of $637.50 in processing fees. More than 48 hours after QPS and the Police Minister were approached for an on-camera comment about the released documents, a written response was sent. The clock ticks fast as soon as RTI documents are released, however, agencies don't care about this scenario when it comes to a journalist wanting assistance with interpretation or comment.

Television news is disproportionally affected by the amendment. It is unfair and not in the public interest for the RTI Act to be fashioned in a way that makes RTI operate effectively for print and on-line media where journalists can comfortably publish information in a number of hours with just a few phone calls. The creation of this system favouring print media has happened at a time when print media has declining prominence on the media landscape and television news has been expanding.

Nine News believes the amendment runs counter to the objects of the RTI Act and the recommendations of Dr Solomon's review panel which assessed and rejected so-called "simultaneous disclosure" in favour of recognising that it is counter-productive to the object of the Act. There was recognition that applicants should be given opportunity to benefit from the "reward" of getting access to their documents first.

It is not clear how the public interest is served in forcing media outlets to rush to publish information because of the requirements imposed by the *Right to Information and Integrity (Openness and Transparency) Amendment Bill 2012* . Nine News believes it is a reasonable request to suggest the introduction of a timeframe of five business days prior to Disclosure Log publication, or longer as is effectively the convention in NSW with its Disclosure Logs created by the *Government Information (Public Access) Act 2009*.

It is worthwhile to consider that agencies themselves have a minimum 25 business days or even months to locate and process RTI requests, and regularly request extensions of time from applicants. Yet, the amendment expects me to be able to produce broadcast news reports based on often complex information in a number of hours after documents are dumped in my inbox, often late in the afternoon.

I ask that this amendment – that disproportionately impacts on television news - in what is otherwise effective legislation be reconsidered.